United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1589

To be argued by
JAMES A. MOSS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1589

UNITED STATES OF AMERICA,

Appellee,

—v.—

MANUEL ALFONSO RODRIGUEZ and
RAYMOND GERALDO,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Raymond Geraldo and Manuel Alfonso Rodriguez appeal from judgments of conviction entered on November 22, 1976 and November 23, 1976, respectively, in the United States District Court for the Southern District of New York, after a fourteen-day trial before the Honorable Kevin T. Duffy, United States District Judge, and a jury.

Indictment 76 Cr. 503, filed May 25, 1976, charged Geraldo, Rodriguez and five others in Count One with conspiracy to file false documents with the United States Department of State and to violate the Gun Control Act of 1968, in violation of Title 18, United States Code, Section 371. Counts Two, Three and Four charged Geraldo, Rodriguez and their five co-defendants with having facilitated the filing of three false documents with

the State Department on May 5, 1976, in violation of Title 18, United States Code, Sections 1001 and 2.

The five co-defendants each pleaded guilty to one of these charges prior to, or at, the trial, which commenced on September 20, 1976.* On October 8, 1976, the jury found Rodriguez guilty of Counts One and Three of the indictment ** and returned a verdict of guilty against Geraldo on all four counts.

On November 22, 1976, Geraldo was sentenced by Judge Duffy to terms of four years imprisonment on each of the four counts, to be served concurrently. On the following day, Judge Duffy sentenced Rodriguez to two consecutive five-year terms of imprisonment.

On February 11, 1977, Rodriguez moved in the District Court for a writ of habeas corpus, on the basis of allegations similar to those raised on the appeal, and, as well, for bail pending appeal. Judge Duffy denied both motions, on March 8 and 11, 1977, respectively, holding, *inter alia*, with respect to the bail application that Rodriguez's appellate claims are insubstantial.

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* On May 26, 1976, defendant Miguel Celis entered a plea of guilty to Count Three of the indictment. Defendant Irwin Tobocman pleaded guilty to Count One on August 26, 1976. On September 21, 1976, defendants Dominick Cagianese and Frank Alvarez each pleaded guilty to Count Three. Defendant Robert Michaelson entered a guilty plea to Count Four of the indictment on September 22, 1976. On November 22, 1976, Judge Duffy sentenced Michaelson and Alvarez to terms of five years imprisonment; on the same date, the imposition of sentence as to Tobocman and Cagianese was suspended. On November 23, 1976, Judge Duffy suspended the imposition of sentence as to Celis.

** As to Rodriguez, Counts Two and Four had been dismissed by Judge Duffy at the close of the Government's case-in-chief.

Statement of Facts

The Government's Case

1. The Nature of the Illegal Scheme

As explained in the Government's opening statement, the conspiracy charged in the indictment involved a scheme to illegally sell submachine guns to buyers in this country by filing with the United States Department of State four fraudulent documents designed to create the false impression that the weapons were being lawfully exported to a foreign government. This plan was devised and executed by the co-conspirators so as to circumvent the registration and transfer provisions of Title II of the Gun Control Act of 1968 (Title 26, United States Code, Sections 5811, *et seq.*), which made the transfer of the submachine guns in this country unlawful. Three false documents were actually submitted to the State Department's Office of Munitions Control on May 5, 1976, in support of an application for a license to export 10,000 submachine guns to the government of El Salvador. These documents included an "end use certificate", a purchase order and a State Department application form "DSP-5." All of the defendants were arrested shortly after defendants Rodriguez and Celis brought the fourth necessary document—a "DSP-83"—to New York from El Salvador and received $75,000 in cash. (Tr. 4-22).*

2. The Evidence Adduced at Trial

The Government called six witnesses to testify at the trial. The Government's chief witness was Special Agent

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* References to the trial transcript are abbreviated herein as "Tr."; to the Government's trial exhibits as "GX"; to Rodriguez's trial exhibit as "DX"; to Rodriguez's brief as "Br."; and to Rodriguez's appendix as "App."

Joseph F. Kelly of the Treasury Department's Bureau of Alcohol, Tobacco and Firearms (ATF). Virtually all of his testimony related to meetings he had attended, in an undercover capacity, with the defendants, all of which were tape recorded on a "Nagra" tape recorder that Agent Kelly was wearing. In addition, a videotape was made of the final meeting, at which the defendant Rodriguez was present.

In March 1976, James Gray, a salesman employed by Wittington Imports, Inc., met defendant Raymond Geraldo in the office of defendant Robert Michaelson, then President of Wittington Imports. (Tr. 61, 63-66). Geraldo identified himself to Gray as an international arms broker and exhibited to Gray a list that included various types of weapons and armaments. (Tr. 67, 132). Later that day Michaelson asked Gray whether "we can do anything" with the list. (Tr. 69).

Gray then telephoned Vincent Coppola, a friend whom Gray believed had underworld connections. Gray described some of the weapons on the list to Coppola and stated that they were available "for your family and friends." Several days later, Gray met with Coppola and delivered the weapons list to him. (GX 1; Tr. 70-72, 96-98, 103). However, Coppola did not deliver the list to his supposed underworld connections, but instead to Anthony Stagg, an individual whom Coppola knew to be a paid government informant, and ATF Special Agent Joseph F. Kelly. (Tr. 99-106).

On March 20, 1976, Coppola took Michaelson to the Pepper Tree Restaurant in Mt. Kisco, New York, to meet Agent Kelly, Stagg and Detective Robert Cercena, of the Mt. Kisco Police Department (hereinafter collectively referred to as "the undercover agents"), who were intro-

duced to Michaelson as prospective purchasers of weapons, "Jo Jo", "Tony" and "Bobby", respectively. (Tr. 111, 182). Michaelson discussed the sale of certain items on the weapons list and arranged a second meeting between the undercover agents and "my man Ray Geraldo." (GX 3A, at 1, 22; Tr. 111-12, 182-84).

On the following day, Geraldo met with Coppola and the undercover agents. During the meeting, Geraldo stated that the handguns and machine guns on the weapons list were being stored in a warehouse in the Bronx. He further revealed that he had connections in Central America who could be bribed to supply any documentation that might be needed to facilitate the sale of these weapons to the undercover agents. (Tr. 112-16, 196-200).

On the following evening, March 22, 1976, Geraldo brought the defendant Dominick Cagianese to meet with the undercover agents. At this meeting, Cagianese proposed the sale of American-made Bushmaster submachine guns to the agents. Cagianese and Geraldo then discussed the mechanics of this proposed transaction, including the bribing of an official of a Central American government to provide a fraudulent "end use certificate"* to the State Department in support of an application for a license to export guns to that Central American Government. Geraldo suggested that once an export license was

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* An "end use certificate" is a document that is required to be submitted, along with other documents, to the State Department's Office of Munitions Control in support of an application for a license to export munitions. The document, which must be executed by a responsible official of a foreign government or other foreign agent, must attest to the ultimate use to which the requested munitions will be put. Without such a certificate, the application for an export license will be denied. (Tr. 596-99, 664-65).

issued, the submachine guns could be surreptitiously diverted to the undercover agents in this country and crates of rocks, not guns, could be shipped in their stead to Central America. Geraldo concluded the meeting by promising to travel to Guatemala "to find out who I pay off" for the necessary false documentation. (GX 5B, at 1-6, 8-10, 77-94; Tr. 120-01, 209-12).

On March 27, 1976, at another meeting at the Pepper Tree Restaurant, Cagianese informed the undercover agents that Bushmaster submachine guns could be purchased from a manufacturer in North Carolina for $280 per unit and that he would submit a final purchase order to the manufacturer when the State Department approved an export license. He added that Geraldo was already in Guatemala arranging for an end use certificate to be delivered. Cagianese also indicated that he would arrange a test demonstration of the Bushmaster submachine gun for the agents. (GX 6B; Tr. 219-22).

On April 1, 1976, in Greensboro, North Carolina, Cagianese, Agents Kelly and Kenneth Waxman, and representatives of the manufacturer of the Bushmaster submachine gun participated in the test demonstration of a model Bushmaster. (GX 7; Tr. 228-34, 659-69). Immediately after the demonstration, Cagianese placed an initial order with the manufacturer for 1,700 Bushmasters. The manufacturer then took steps to prepare for the production of the guns, including the lining up of the necessary subcontractors. He understood that the expected order would be for 10,000 Bushmasters, to be exported to Guatemala upon approval by the State Department. (Tr. 666-67).

On April 12, 1976, at a meeting at the Pepper Tree Restaurant, Geraldo informed the undercover agents that a high ranking government official in Guatemala had

agreed to furnish an end use certificate for $50,000. Geraldo added that Michaelson had agreed to advance this $50,000 payment. (Tr. 241-42). However, at an ensuing meeting on May 2, 1976, Geraldo reported that because this Guatemalan official had recently been assassinated, Geraldo had been forced to look elsewhere for the end use certificate. He stated that he had flown to El Salvador to meet with its Chief of Staff, Colonel Manuel Rodriguez, and that Colonel Rodriguez had agreed to supply an end use certificate for 10,000 submachine guns in exchange for $75,000. (Tr. 250-01).

At a second meeting held later that day, Geraldo introduced the personal representative of Colonel Rodriguez—defendant Miguel Celis—to Michaelson and the undercover agents. At this meeting Celis produced three pieces of stationery, each bearing the letterhead of El Salvador's armed forces on the top and the signature of Colonel Manuel Alfonso Rodriguez at the bottom. Celis stated that Colonel Rodriguez had signed the three documents, but had otherwise left them blank, so as to allow the proper text for an end use certificate to be inserted above the signature.* (Tr. 253-54). During the meeting, Michaelson, Geraldo and the undercover agents discussed with Celis when and how Rodriguez and Celis would receive their $75,000 cash payoff. It was agreed that the money would be paid when Rodriguez came to the United States, as he had planned to do, later in the month. (Tr. 258-60).

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* Before any of the three pieces of letterhead stationery were received in evidence, the Government informed the Court and defense counsel that it would not contend that the signatures of Rodriguez had been placed on the documents by Rodriguez himself, but that it would contend that the signatures appeared on the documents with the full authorization and knowledge of Rodriguez. (Tr. 255-57). During its summation, the Government reiterated this position to the jury. (Tr. 764).

On May 3, 1976 and May 4, 1976, Geraldo and Celis met with defendant Frank Alvarez, in the latter's office. Alvarez dictated to Geraldo a Spanish text for an end use certificate, which was then typed above Rodriguez's signature on one of the pieces of letterhead that had been provided by Celis. The completed document (GX 31) represented in Spanish that 10,000 Bushmaster machine guns and 1.5 million rounds of ammunition were being purchased by El Salvador for the exclusive use of its armed forces. (Tr. 263-64, 271-72, 605-09).

Alvarez, with the assistance of his employee, Timothy Gomez, also prepared two additional documents for submission to the State Department—a purchase order and an application for an export license (State Department Form DSP-5). Like the end use certificate, these documents represented that El Salvador was purchasing 10,000 Bushmaster machine guns and ammunition for its national defense. (GX 30, 32; Tr. 277-80, 605-10).

On May 5, 1976, at the express direction of defendant Alvarez, Timothy Gomez filed the completed end use certificate, purchase order and DSP-5 application form at the State Department's Office of Munitions Control, in Arlington, Virginia. At the time of this filing, Gomez was told by an official of the State Department that the license application was incomplete without a fourth document—a State Department Form DSP-83—to be executed by Colonel Rodriguez. (Tr. 612-17, 619). Gomez returned to New York with this form, which was filled out and then forwarded to El Salvador to be signed by Rodriguez. (Tr. 300-01, 554, 620).

In a telephone conversation with Agent Kelly on May 12, 1976, Alvarez stated that he had heard from Michaelson that Rodriguez had received and signed the DSP-83. (Tr. 300-01, 554). On May 15, 1976, Colonel

Rodriguez and Celis arrived in New York to deliver the executed Form DSP-83 and to receive their pay-off of $75,000. They met with the undercover agents and defendants Michaelson and Irwin Tobocman in a motel room in Mount Kisco, New York. The entire meeting was videotaped, and the tape was shown to the jury on several occasions during the trial. (GX 28A, 28B; Tr. 308-12).

At the beginning of this meeting, Rodriguez was advised by Celis in Spanish that "he [one of the undercover agents] is buying the weapons" and "is going to pay for all the paperwork." (GX 28C, at 2). Celis then turned over to Agent Kelly the completed Form DSP-83 (GX 27) which had been executed by Rodriguez,* and which falsely represented in English that 10,000 Bushmaster submachine guns were being purchased by El Salvador for its national defense. During the course of the meeting, Rodriguez acknowledged that he understood he was being paid "for the document [Celis] has delivered to you." (GX 28C, at 14, 19; Tr. 314). Rodriguez stated in Spanish that he would be able to handle any inquiries by the State Department regarding the weapons and, further, that should any written correspondence concerning the export license application fall into the hands of others, including the President of the Republic, he would "be able to explain." (GX 28C, at 6). In his conversation with Celis, Rodriguez also knowledged that he had had other, prior discussions with Celis concerning this scheme. (GX 28C, at 5-6). Rodriguez, Celis and Tobocman discussed the possibility of additional deals in weapons and agreed that if the State Department became suspicious because of the volume of weapons apparently

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* It was conceded by the defense that Rodriguez had signed this Form DSP-83, prior to arriving at this meeting. (Tr. 256-57, 806).

being purchased by El Salvador, Rodriguez would use his influence to obtain end use certificates from high-ranking foreign officials in other countries. (GX 28C, at 8-11). Following this discussion of future transactions, Rodriguez and Celis accepted from Agent Kelly—and counted—the $75,000 in cash they were to receive for this transaction. Shortly thereafter, Rodriguez and his co-defendants were placed under arrest. (GX 28C, at 19).

In a post-arrest statement, which he joined in offering into evidence (Tr. 631-32), Rodriguez stated, among other things, that he had gone to Mount Kisco in order to meet with his wife, that he was paid the $75,000 in cash as an act of goodwill and, later in the statement, that he had received the $75,000 for having signed a petition to the State Department for the export of five guns to his country, for which his country was going to pay nothing. (DX A).

The Defense Case

At the close of the Government's case, Geraldo and Rodriguez rested without calling any witnesses.

ARGUMENT

POINT I

The Indictment Was Legally Sufficient.

Rodriguez and Geraldo challenge for the first time on appeal the legal sufficiency of the indictment in this case. With respect to all four counts in the indictment, appellants now contend that the indictment failed to specify what was false about the three documents submitted to the State Department on May 5, 1976, and failed to iden-

tify how these false statements were "material and capable of influencing" the State Department. (Br. 63-64, 68). Further, with respect to Count III of the indictment, they contend that the indictment fails to allege a crime when it charges that each of the defendants "unlawfully, wilfully and knowingly made, facilitated the making of, and caused to be made" false statements—because the word "facilitate" does not appear in the text of either of the applicable criminal statutes (Title 18, United States Code, Sections 1001 and 2). (Br. 61). Not only are these objections to the indictment belated, and therefore, barred, they are, as well, unsupported in law and in fact.

Rule 12(b)(2) of the Federal Rules of Criminal Procedure provides in relevant part that "objections based on defects in the indictment" must be raised "prior to trial", except that an objection that the indictment "fails to charge an offense" shall be noticed by the Court "at any time during the pendency of the proceedings." By failing to contest the validity of the indictment in the District Court, Rodriguez and Geraldo have waived any objection on appeal to its sufficiency. The rule of waiver codified in Rule 12(b)(2)—plainly applicable to these claims—prohibits the belated resurrection of unraised objections, especially when as here, the asserted defects in the indictment were apparent and known to defendants' attorneys prior to trial. *United States* v. *Campisi*, 306 F.2d 308, 311-12 (2d Cir.), *cert. denied*, 371 U.S. 925 (1962); *United States* v. *Galgano*, 281 F.2d 908, 911 (2d Cir. 1960), *cert. denied*, 366 U.S. 967 (1961); *United States* v. *Private Brands, Inc.*, 250 F.2d 554, 557 (2d Cir. 1957), *cert. denied*, 355 U.S. 957 (1958); see generally, *Davis* v. *United States*, 411 U.S. 233, 243 (1973); *Shotwell Mfg. Co.* v. *United States*, 371 U.S. 341, 362-64 (1963); *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966).

Moreover, the claims of insufficiency in the indictment are contradicted by the very language of the indictment. For example, the defendants are simply wrong when they contend that the indictment failed to specify what was false in the statements submitted to the State Department on May 5, 1976. (Br. 63). Counts Two, Three and Four—the substantive counts—of the indictment explicitly charge that each of the three documents filed at the State Department represented that 10,000 submachine guns were being purchased by the government of El Salvador for its national defense, when in truth and in fact, defendants knew this to be false. The language of the indictment, therefore, specified the falsity of these documents with more than sufficient particularity.

In addition, the defendants are simply mistaken in law when they argue that the indictment should have alleged that the false statements were "material and capable of influencing" the State Department. (Br. 63). The law in this circuit is clear that an indictment need not allege—and the Government need not prove—"materiality" in a prosecution for submitting false statements to a federal agency.* Title 18, United States Code, Sec-

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* In *United States* v. *Rinaldi*, *supra*, 393 F.2d at 99-100, this Court noted:

> "As to the question of materiality, Section 1001 provides:
>
> 'Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.'

[Footnote continued on following page]

tion 1001; *United States* v. *Rinaldi*, 393 F.2d 97, 100 (2d Cir.), *cert. denied*, 393 U.S. 913 (1968); *United States* v. *Aadal*, 368 F.2d 962, 964 (2d Cir. 1966), *cert. denied*, 386 U.S. 970 (1967); *United States* v. *Mahler*, 363 F.2d 673, 678 (2d Cir. 1966); *United States* v. *Marchisio*, 344 F.2d 653 (2d Cir. 1965); *United States* v. *Silver*, 235 F.2d 375 (2d Cir.), *cert. denied*, 352 U.S. 880 (1956). Rather, it is sufficient to allege, as the instant indictment does, that the false statements were submitted "in any matter within the jurisdiction" of a federal agency.* *United States* v. *Adler*, 380 F.2d 917, 920-22 (2d Cir.), *cert. denied*, 389 U.S. 1006 (1967); *United States* v. *Marchisio*, *supra*; *United States* v. *Levine*, 193 F.2d 848, 851 (2d Cir. 1951); *cert. denied*, 343 U.S. 946 (1952).

Finally, appellants' contention that Count Three of the indictment fails to allege a crime because it charges "facilitation" is illogical and inconsistent. This argument is based upon the unsupported premise that an indictment must employ the precise language of a criminal statute. Even assuming *arguendo* that appellants' novel standard were the law, Count Three passes muster since

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We recognized that other circuits have held that materiality must be read into all the provisions of Section 1001. However, the statute is clearly written in the disjunctive and we have held that the prosecution is not obliged to prove the materiality of 'false statements' alleged to have been made in violation of that section. See *United States* v. *Marchisio*, 344 F.2d 653 (2d Cir. 1965); *United States* v. *Silver*, 235 F.2d 375 (2d Cir.), *cert. denied*, 352 U.S. 880, 77 S.Ct. 102, 1 L.Ed.2d 80 (1956)."

* Furthermore, allegations that the government agency was "influenced" by the false statements are never required in an indictment brought under Title 18, United States Code, Section 1001, even in those jurisdictions, unlike the Second Circuit, that require proof of "materiality". *See, e.g., United States* v. *Johnson*, 530 F.2d 52 (5th Cir. 1976); *Blake* v. *United States*, 323 F.2d 245, 247 (8th Cir. 1963).

it charges that the defendants "willfully . . . caused" an illegal act to be done, in the precise language of Title 18, United States Code, Section 2(b).

POINT II

The Claims of Prosecutorial Misconduct Are Baseless.

Rodriguez and Geraldo seek reversal of their convictions on the basis of two distinct claims of prosecutorial misconduct. First, they argue that because the Government introduced the "end use certificate" referred to in Count III as an exhibit at trial and before the grand jury knowing "that the defendant Rodriguez did not sign the 'end use certificate' as charged in the indictment and that it was Miguel Celis who *had traced* the signature of the defendant thereon", the "case was presented on false evidence known to the Government to be false." (Br. 6-8). They also contend that the Government, in its summation, erroneously referred to matters outside the record and improperly alluded to the failure of the appellants to testify. (Br. 59-61, 69). Both of these claims are flatly contradicted by the record.

The claim that this prosecution was pursued under the false theory that Rodriguez actually signed the "end use certificate" is directly contrary to the facts. Indeed, the United States Attorney expressly stated to both the District Court and defense counsel during the trial, on the record, that the Government did *not* claim that Rodriguez had personally signed the document.* (Tr.

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* It was also made clear, at the same time, however, that Government *did* claim that the signature had been placed on the "end use certificate" with Rodriguez's full knowledge and authorization. (Tr. 256). The good-faith basis for that claim

[Footnote continued on following page]

256). Moreover, the jury was expressly told in the Government's summation that the Government did *not* claim that Rodriguez signed the "end use certificate". (Tr. 764). This concession was seized upon by Rodriguez's trial counsel, C. Joseph Hallinan, Jr., Esq., who argued in summation that Rodriguez ws obviously innocent since it had been necessary "to forge or trace" his signature.** (Tr. 806).

Furthermore, the only basis offered by appellants to support their insinuation that the Government acted improperly before the grand jury is the illogical claim that the end use certificate "was the evidence of the crime itself" and that this document "was false evidence." (Br. 7). The short answer to this claim is that neither appellant raised it during the trial proceedings as required by Rule 12(b)(2) of the Federal Rules of Criminal Procedure. *United States* v. *Blitz*, 533 F.2d 1329, 1344 (2d Cir.), *cert. denied*, 45 U.S.L.W. 3249 (U.S., Oct. 4, 1976).

Moreover, the claim is legally insufficient to vitiate the indictment. It is settled law in this Circuit, as well as in the Supreme Court of the United States, that

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is contained in the grand jury testimony of Miguel Celis, which was submitted, sealed, to Judge Duffy in response to a post-trial motion—denied by Judge Duffy—raising these same allegations of misconduct.

** Appellants' claim on appeal that the Government violated its obligation under *Brady* v. *Maryland*, 373 U.S. 83 (1963), by not disclosing to the defense that the signature on the "end use certificate" had been traced (Br. 9) is rendered patently frivolous by this closing argument of Mr. Hallinan. Quite obviously, the defense *had* been informed that the signature of Rodriguez had been placed on the document by someone else. See *United States* v. *Stewart*, 513 F.2d 957, 959-60 (2d Cir. 1975). Indeed, Mr. Hallinan conceded this to the District Court during the trial. (Tr. 720).

> ". . . an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence. . . ." *United States* v. *Calandra*, 414 U.S. 338, 345 (1974).

See also *United States* v. *Blitz*, *supra*, 533 F.2d at 1344; *United States* v. *James*, 493 F.2d 323, 326 (2d Cir.), *cert. denied*, 419 U.S. 849 (1974) (and cases there cited). Appellants' accusations of misconduct, being based solely upon "unsupported suspicion", should be dismissed without a hearing. *In re Millow*, 529 F.2d 770, 774 (2d Cir. 1976); *cf.*, *United States* v. *Guillette*, 547 F.2d 743, 753 (2d Cir. 1976).

Rodriguez and Geraldo also allege prosecutorial misconduct based upon arguments made during the Government's summation, none of which were objected to at the trial. (Br. 59-61, 69). In particular, they assert that the Government's summation "introduced to the jury matters that were not in evidence." (Br. 60). However, an examination of their charges reveals that in each instance the prosecutor merely made simple inferences from the facts in evidence in a manner fully consistent with the express dictates of this Court, see, e.g., *United States* v. *Steinberg*, Dkt. No. 76-1253, slip op. 2191, 2201 (2d Cir., March 7, 1977); *United States* v. *Wilner*, 523 F.2d 68, 73 (2d Cir. 1975). Similarly, appellants' charge that the Government continually referred to "undisputed" evidence, and so commented unfairly on the defendants' failure to take the stand, is contrary to the record. In each of the statements so challenged, the United States Attorney was merely commenting that he believed *his assessment* of the evidence would not be dis-

puted by defense counsel in their summations.* In addition, of course, this Court has held on numerous occasions that when the credibility or sufficiency of the testimony introduced by the Government has been attacked, it is entirely proper for the prosecutor to assert in summation that factual matters are "unrebutted" or "uncontradicted," *United States* v. *Rodriguez*, 545 F.2d 829, 832 (2d Cir. 1976), *cert. denied*, 45 U.S.L.W. 3489 (U.S., Jan. 15, 1977); *United States* v. *Armedo-Sarmiento*, 545 F.2d 785, 793 (2d Cir. 1976), *cert. denied*, 45 U.S. L.W. 3601 (U.S., March 8, 1977), and cases there cited. Clearly nothing in the summation itself was "of such a nature that a jury would naturally and necessarily construe [it] to be directed to the failure of the defendant to testify," *id.*; cf. *United States* v. *Alfonso-Perez*, 535 F.2d 1362, 1366-67 (2d Cir. 1976).

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* For example, at pages 737-38 of the trial transcript, Mr. Fiske addressed the jury as follows:

> "It might be useful right at the very beginning to make it clear *what is not in dispute* in this false statement case.
>
> First of all, the proof shows, *there is not going to be any dispute about this*, that three documents, Government's Exhibit 30, Application for an Export License, Government's Exhibit 31, so-called End Use Certificate, and Government's Exhibit 32, purchase order, were filed with the United States State Department.
>
> The proof also shows, *and I don't think there is going to be any dispute about this*, that each one of those three documents is false. Each one of those three documents states that 10,000 Bushmaster submachine guns are being purchased by the government of El Salvador. *I don't think there is going to be any dispute in this case* that that statement, as it appears on each one of those three documents, is false.
>
> So in this false statement case we start right at the beginning *with no dispute over the fact* that the documents were filed with the State Department and that they are in fact false." (Emphasis supplied).

Finally, appellants' objection to the Government's argument that Agent Kelly had employed proper undercover techniques in the investigation of this case (Br. 66, 69) is disingenuous. Throughout his cross-examination of Agent Kelly, trial counsel for Geraldo, Gordon Lang, Esq., repeatedly insinuated (i) that Agent Kelly had enlisted the services of underworld criminals (Tr. 354, 367, 415); (ii) that thorough investigative techniques had not been followed by the ATF agents (Tr. 383, 414); and (iii) that undercover agents had threatened some or all of the defendants. (Tr. 394). Thereafter, in summation, Mr. Lang accused the Government of "selective prosecution" (Tr. 783) and of conducting Orwellian surveillance upon the defendants. (Tr. 786). In addition, Rodriguez's trial attorney, Mr. Hallinan, in his closing remarks, characterized the efforts of Agent Kelly and his fellow agents as "sloppy investigative work" and urged the jury to "protect yourselves and us from that kind of work." (Br. 812). Consequently, "in the context of the trial and balanced against the tactics of the defense lawyers", the comments of the United States Attorney in summation constituted a permissible attempt "to offer a rebuttal to the attacks made directly against his witnesses and directly or indirectly against his office." *United States* v. *Tramunti*, 513 F.2d 1087, 1119 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975). This was particularly appropriate since the remarks of defense counsel concerning "selective prosecution" were not properly addressed to the jury at all, see *United States* v. *Berrigan*, 482 F.2d 171, 174-76 (3rd Cir. 1973); *United States* v. *Malinowski*, 472 F.2d 850, 860 (3rd Cir.), *cert. denied*, 411 U.S. 970 (1973); *People* v. *Walker*, 14 N.Y.2d 901, 904, 252 N.Y.S.2d 96, 99 (1964). Indeed, this Court has very recently noted that an attempt by defense counsel to comment on the investigative techniques employed by the Government was a "red herring" having nothing to

do with the factual issues before a jury. *United States* v. *Cheung*, Dkt. No. 76-1362, slip op. 2063, 2069 (2d Cir., Feb. 28, 1977).

POINT III

The Jury's Verdicts Were Based Upon Sufficient and Properly-Admitted Evidence.

Geraldo and Rodriguez advance various claims that the evidence adduced at trial was either inadmissible, unconstitutionally obtained or insufficient. Each of these claims is untenable.

Rodriguez alleges that the videotape of his May 15, 1976 meeting in Mount Kisco (GX 28A, 28B) and his post-arrest statement (DX A) should have been suppressed by the District Court under the authority of *Miranda* v. *Arizona*, 384 U.S. 436 (1966). (Br. 45-56). Rodriguez fashions this argument by characterizing the videotaped undercover meeting as a "surreptitious unwarned interrogation of the defendant Rodriguez" (Br. 49), and by asserting, without the slightest support, that after his arrest Government attorneys "sidetracked" him and extracted a statement from him by neglecting to advise him of his constitutional rights and by refusing to honor his request to telephone various government officials in this country and El Salvador. (Br. 53-56).

First, Rodriguez never objected at trial to the offer into evidence of either the videotape or his post-arrest statement, but rather, joined in the Government's offer of these exhibits. Thus, he is precluded from objecting to this evidence on appeal. *United States* v. *Bianco*, 534 F.2d 501, 507-08 (2d Cir.), *cert. denied*, 45 U.S.L.W. 3249 (U.S., Oct. 4, 1976); *United States* v. *Rose*, 525 F.2d 1026, 1027 (2d Cir. 1975), *cert. denied*, 424 U.S. 956 (1976); *United States* v. *Indiviglio*, *supra*.

Second, even had he interposed prompt objections at trial, Rodriguez would not have been entitled under *Miranda* to have either the videotape or his post-arrest statement excluded. There was no constitutional requirement that Agent Kelly and his fellow agents advise Rodriguez during the videotaped meeting of his *Miranda* rights, since Rodriguez had not been placed "in custody" at any time during the meeting. *Oregon* v. *Mathiason*, 45 U.S.L.W. 3505 (U.S., Jan. 25, 1977) (per curiam); *Beckwith* v. *United States*, 425 U.S. 341, 344 (1976). Rodriguez's attempt to circumvent this infirmity by alleging that at the time of the meeting, the Government agents *intended* to place him in custody (Br. 50) is to no avail. In fact, Agent Kelly and his fellow agents were expressly advised after consultations with the United States Attorney's Office that Rodriguez was *not* to be arrested at all unless his actions and statements *at the meeting* established his guilt. (Tr. 459-60). And in any event, the intentions of the agents are totally irrelevant. The applicability of *Miranda* is determined using an objective test; that is, something must have been said or done by the agents, either in their manner or in the tone or extent of their questioning, which indicated that they would not have heeded a request by Rodriguez to depart, had he made such a request. *United States* v. *Hall*, 421 F.2d 540, 544-45 (2d Cir. 1969), *cert. denied*, 397 U.S. 990 (1970). See also *United States* v. *Clark*, 525 F.2d 314 (2d Cir. 1975); *United States ex rel. Sanney* v. *Montague*, 500 F.2d 411 (2d Cir.), *cert. denied*, 419 U.S. 1027 (1974). Rodriguez has nowhere claimed that he felt intimidated at the meeting by a "police-dominated atmosphere." *Miranda* v. *Arizona*, *supra*, 384 U.S. at 445. As the Supreme Court recently stated in *Oregon* v. *Mathiason*, *supra*, 45 U.S.L.W. at 3505:

> "Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply

> by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer Miranda warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. Miranda warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody'. It was that sort of coercive environment to which Miranda by its terms was made applicable, and to which it is limited."

A fortiori where, as here, the suspect is not even aware that he is in the presence of law enforcement officers, *Miranda* is not applicable.*

Rodriguez's belated objection under *Miranda* to the admission of his post-arrest statement is also baseless. It is evident from the statement itself that Rodriguez was properly and timely advised of each of his *Miranda* rights and that he *voluntarily* agreed to continue answering questions, even after being told that he could "stop at any time." (App. 87 SA). His assertion that at some unspecified time and place he had asked for permission to make telephone calls to "the President of the Republic

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* To the extent Rodriguez also relies upon the holding in *Massiah* v. *United States*, 377 U.S. 201 (1964), this reliance is misplaced. By its very language, *Massiah* applies only to surreptitious interrogation of defendants who have already been indicted or arrested and who have already availed themselves of the right to counsel. Rodriguez was neither under arrest, under indictment, nor represented by counsel at the time of the videotaped meeting.

of El Salvador, the Defense Minister, the Ambassador, and the United States Armed Forces Chief of Staff" (Br. 54) finds no support whatsoever in the record. The plain fact is that after being advised in Spanish that "[i]f you do not have funds to retain an attorney, an attorney will be appointed to represent you and you do not have to answer any questions before this attorney is appointed," Rodriguez did not request an attorney, but continued to answer the questions put to him. (App. 87 SA).

Rodriguez and Geraldo also contest (i) the admission into evidence of the various audio tape recordings made during the undercover negotiations on the ground that they were obtained "without any warrant" (Br. 67), and (ii) the admission of the submachine gun (GX 7) which was demonstrated in North Carolina for the defendant Cagianese and the undercover agents, on the ground that it was introduced solely to "inflame the jury." (Br. 66). The admission of these exhibits was clearly proper.

The warrantless recording of an oral communication violates neither the Constitution nor federal law when it is intercepted with the consent of one of the parties to the communication. Title 18, U.S.C. § 2511(2)(c) and *United States* v. *White*, 401 U.S. 745 (1971); *Hoffa* v. *United States*, 385 U.S. 293, 302-03 (1966); *Lopez* v. *United States*, 373 U.S. 427 (1963); *United States* v. *Bonanno*, 487 F.2d 654, 657-58 (2d Cir. 1973). The audiotapes introduced into evidence at the trial were all recorded with the knowledge and consent of Agent Kelly, who was present during all of the recorded meetings. (Transcript of *Voir Dire*, dated September 20, 1976, at 8).

The admission into evidence of the Government's Exhibit 7—the demonstration model of the Bushmaster submachine gun—was also proper, since this exhibit was

unquestionably relevant to the issues on trial. The weapon represented an important piece of physical evidence corroborating Agent Kelly's testimony about the test demonstration in North Carolina. In addition, proof of its physical characteristics as an "automatic weapon," as defined in Title 26, United States Code, Section 5845, was essential to show that one of the objectives of the conspiracy was to illegally violate the Gun Control Act of 1968.* The "prejudice", if any, to the defendants which may have resulted from the introduction of the weapon was minimal, since the jury was never permitted to touch it or view it from a near distance. (Tr. 236). In these circumstances, the trial court plainly did not abuse its discretion in finding that the probative value of this evidence outweighed any potential for prejudice. Indeed, this Court has upheld the admissibility of guns in situations where its relevance was far more attenuated than here. See *United States* v. *Weiner*, 534 F.2d 15, 18 (2d Cir.), *cert. denied*, 45 U.S.L.W. 3229 (U.S., Oct. 4, 1976); *United States* v. *Stolzenberg*, 493 F.2d 53 (2d Cir. 1974); *United States* v. *Ravich*, 421 F.2d 1196 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970).

With respect to the sufficiency of the evidence, Rodriguez claims that "the introduction of mountains of hearsay testimony" deprived him of a fair trial. (Br. 65). He also contends that as to Count One, there was no independent evidence which established his participation

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* The proposed sale of Bushmasters to the government agents, which was charged in the indictment as one of the underlying objectives of the conspiracy, was unlawful only because (a) the Bushmaster submachine gun is an automatic weapon, and (b) the conspirators intended to violate the registration and transfer requirements of the Gun Control Act. 26 U.S.C. § 5811, *et seq.*

in the conspiracy during the life of the conspiracy. (Br 57-58). As to Count Three, Rodriguez asserts that there was no evidence to support a charge that he aided and abetted the filing of the false end use certificate. (Br. 67). Similar challenges to the sufficiency of the evidence were correctly rejected by the District Court. (Tr. 724-25).

Rodriguez's reliance on *Bruton* v. *United States*, 391 U.S. 123 (1968), to support his contention that the introduction of "mountains of hearsay" deprived him of a fair trial is quixotic. *Bruton*, and its progeny, address problems that arise when one defendant's post-arrest admissions inculpate another defendant on trial. There were no such problems here, since Rodriguez's post-arrest statement did not even mention his co-defendant Geraldo. (App. 87SA-96SA). Very simply, the "hearsay" evidence offered at the trial—consisting of the tape recorded admissions of the defendants and the statements of co-conspirators in futherance of the conspiracy—was relevant and admissible, notwithstanding the fact that there was a great deal of it. Fed. R. Evid., Rule 801(d)(2)(A) and (E).

Rodriguez claims that there was insufficient independent proof of his participation in the conspiracy, in that while "the conspiracy charged . . . had already been consummated as of May 5, 1976," he was not "in view at all" until May 15, 1976. (Br. 57). The premise underlying this argument—that the conspiracy was consummated on May 5, 1976 with the filing of three of the four necessary documents at the State Department—is faulty. The conspiracy was not consummated by the mere filing of these documents, since its primary objective—to sell 10,000 submachine guns illegally—had not yet been attained. See *Grunewald* v. *United States*, 353 U.S. 391, 401-02 (1957); *Krulewitch* v. *United States*, 336 U.S. 440, 442 (1949);

United States v. *Accardi*, 342 F.2d 697, 700 (2d Cir. 1965). Indeed, the conspiracy came to an end when it did—*i.e.* May 15, 1976*—only because its participants were arrested on that date. See *United States* v. *Borelli*, 336 F.2d 376, 389-90 (2d Cir. 1964), *cert. denied*, 379 U.S. 960 (1965). Thus, the evidence of Rodriguez's pre-arrest admissions and conduct at the videotaped meeting of May 15, 1976 was clearly admissible to prove his independent participation in the conspiracy charged in Count One. This evidence was more than sufficient to warrant the introduction of his co-conspirators' hearsay declarations. *United States* v. *Barrera*, 486 F.2d 333, 338 (2d Cir. 1973); *United States* v. *Calabro*, 449 F.2d 885, 889 (2d Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972). The receipt of this evidence by the District Court, therefore, was not error and the verdict as to Count One was fully supported by admissible evidence.

Finally, Rodriguez challenges the sufficiency of the evidence as to Count Three, which charged that he aided and abetted the filing of the false end use certificate. He asserts that "[t]here was no evidence as to who was the principal and what it was that was done by the defendant to be an aider and abetter." (Br. 68). This contention wholly ignores the substantial body of evidence adduced at trial that indicated that Rodriguez played a significant—indeed, an essential—role in the filing of the end use certificate.

For example, the evidence established, among other things, that (i) prior to May 2, 1976 in El Salvador, Rodriguez had discussed with his trusted associate, Miguel

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* As charged in Count One of the indictment, the conspiracy existed "[f]rom on or about the 1st day of January, 1976, up to and including the 15th day of May, 1976."

Celis, and with Geraldo the matter of his receiving a substantial pay-off in exchange for supplying a false end use certificate to Geraldo* (Tr. 251, 253-54); (ii) on May 2, 1976, Celis arrived in New York with three documents bearing the letterhead of Rodriguez's office, one of which was actually filed at the State Department three days later by Timothy Gomez, after a false statement had been typed onto it (Tr. 253-54, 263-64, 271-72, 277-80, 605-19); (iii) during the same trip to New York, Celis negotiated the amount and terms of the pay-off that was to be made to Rodriguez and himself (Tr. 258-60); and (iv) on May 15, 1976, Rodriguez and Celis arrived in New York with an additional false document —the DSP-83**—which Rodriguez admittedly had signed, discussed the measures they would take to cover up the scheme should the State Department make inquiries in El Salvador, and accepted $75,000 in cash from the undercover agents. (GX 28C, at 6, 8-11, 14). This evidence was more than sufficient to support a finding that Rodriguez "was responsible for the issuance of the statements, that he knew their contents and knew that the statements were false." *Sachs* v. *United States*, 293 F.2d 623, 624 (5th Cir.), *cert. denied*, 368 U.S. 939 (1961). This, in turn, was sufficient to warrant conviction for aiding and abetting a violation of Title 18, United States Code, Section 1001. *United States* v. *Leviton*, 193 F.2d 848, 851 (2d Cir. 1951), *cert. denied*, 343 U.S. 946 (1952); *United States* v. *Blazewicz*, 459 F.2d 442, 443

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* Rodriguez himself acknowledged these discussions during the videotaped meeting on May 15, 1976. (GX 28C, at 5-6).

** Rodriguez's contention (Br. 67) that the Government is "estopped" from arguing the falsity of the statements on the DSP-83, because that document does not affirmatively warn the signer of the criminal consequences of making a false statement, is legally and logically without support. *Cf. United States* v. *Johnson*, 284 F. Supp. 273, 278 (D.C. Mo. 1968), *aff'd*, 410 F.2d 38 (8th Cir.), *cert. denied*, 396 U.S. 822 (1969).

(6th Cir. 1972); *Sachs* v. *United States, supra; Driver* v. *United States*, 199 F.2d 860, 861-62 (5th Cir. 1952).

In *United States* v. *Leviton, supra*, 193 F.2d at 851, this Court held that a conviction under Section 1001 was valid even though the defendant may not have seen the false statements that were submitted by others in his name:

> "As to the fraudulent export declarations covered by counts one to eleven, there is admittedly no direct proof that [defendant] ever saw them. But he was the one to profit most directly from them, and appropriate circumstantial evidence justified the inference as to his guilt in the absence of any evidence to the contrary."

So too, in *Driver* v. *United States, supra*, 199 F.2d at 861-62, the Court of Appeals for the Fifth Circuit upheld a conviction for false statement, ruling that the jury may circumstantially infer a defendant's knowledge of, and consent to, the filing of false documents in his name from the activities of his co-conspirators:

> "It was reasonable for the trial judge to conclude from all the circumstances, as he did, that since Middleton's only object was to get money for himself, and since the refund would be sent to appellant who would have complete control over its disposition, Middleton would not have submitted the return in appellant's name without first securing his authority to use his name, and an agreement as to the division of the spoils, which which would constitute appellant an aider and abettor in the use of the false return."

Clearly, in the instant case, the proof as to the actions of Rodriguez, Celis and Geraldo established circumstan-

tially, if not directly, that Rodriguez permitted his name to be used on a false document knowing it would be submitted to the State Department. The evidence more than adequately supported the verdict of guilty as to Rodriguez.

POINT IV

Rodriguez's Attack Upon The Competence of His Trial Counsel Is Legally and Factually Unsupported.

Rodriguez's lengthiest argument on appeal is a rambling series of disjointed and unsubstantiated charges that his trial attorney, C. Joseph Hallinan, Jr., Esq., was so incompetent as to deprive Rodriguez of his constitutional right to the effective assistance of counsel. This invidious attack has been callously constructed upon a profound misunderstanding of the record below and of the rules of evidence which, of course, governed the introduction of evidence at the trial.

For example, Rodriguez opens his attack upon his former attorney by claiming that Mr. Hallinan did not conduct a proper investigation so as to discover that the signature of Rodriguez on the "end use certificate" had been traced onto that document by Miguel Celis (Br. 10) and, further, that Mr. Hallinan did not oppose the introduction of this "false" document (Br. 10, 23-24) or seek to affirmatively prove that the signature was not that of Rodriguez. (Br. 11-12). The trial record demonstrates, however, that at the trial Mr. Hallinan was well aware that Celis, and not Rodriguez, had placed the signature on the "end use certificate." * Moreover, Mr. Hallinan

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* In the course of his summation, Mr. Hallinan reminded the jury that the end use certificate had been "forged or traced", and not actually signed by Rodriguez. (Tr. 807).

did oppose the introduction of the "end use certificate" into evidence until such time as he had been assured by the United States Attorney that the Government would not contend that Rodriguez had signed it. (Tr. 253-57). Having received this assurance, it was, of course, no longer necessary for Mr. Hallinan to affirmatively prove that which the Government had conceded.

Rodriguez also assigns as incompetence Mr. Hallinan's failure "to proceed promptly to trial, notwithstanding requests therefore by [Rodriguez] to him," and by his failure "to make a motion 90 days after May 15, 1976 pursuant to 18 U.S.C. Section 3164." (Br. 21). This argument completely overlooks the fact that on June 17, 1976, in open court and on the record, Rodriguez personally waived his rights under the 90-day rule, after being thoroughly advised of those rights by Mr. Hallinan and by the District Court.

Rodriguez's imputation of incompetence based upon Mr. Hallinan's failure to object to, or move to suppress, the videotape, audiotapes and "triple hearsay" testimony of Agent Kelly (Br. 14, 28, 33, 37) is equally misconceived. The tapes, as well as the testimony of Agent Kelly, contained the admissions of the defendant and the statements of their co-conspirators made in furtherance of the conspiracy. Clearly, the admission of this evidence was not objectionable. Fed. R. Evid., Rule 801(d)(2)(A) and (E). Moreover, a motion to suppress the tapes *had* been made at the start of the trial by the attorney for defendant Robert Michaelson. This motion, which was deemed by the District Court to have been made by all defendants, was denied. (Transcript of *Voir Dire*, dated September 20, 1976, at 8-12, 106).

Similarly, the contention that Mr. Hallinan should have objected to the admission of his post-arrest state-

ment and the State Department Form DSP-83 (Br. 14-16, 25-29) fails to state any arguably-valid basis for the exclusion of these documents. The post-arrest statement of Rodriguez was properly received into evidence as an admission under Fed. R. Evid., Rule 801(d)(2)(A). The Form DSP-83, a false document admittedly signed by Rodriguez, which was delivered by Celis to Agent Kelly for submission to the State Department in support of the conspirators' application for a munitions export license, was beyond a doubt, relevant and admissible notwithstanding Rodriguez's claim on appeal that the *color* of the document rendered it inadmissible. (Br. 26-27). Thus, Mr. Hallinan's failure to object to the admission of these exhibits was not a blunder, but an intelligent decision to avoid being overruled in front of the jury on frivolous objections. Indeed, his joining in the offer of the post-arrest statement (Tr. 631-32) and the videotape (Tr. 316) was a shrewd attempt to convince the jury that Rodriguez had nothing to fear from the introduction of these exhibits. Far from demonstrating incompetent representation, the trial record shows that Mr. Hallinan handled these evidentiary matters with kraft and imagination.

A majority of the claims asserted as examples of Mr. Hallinan's incompetence allege his failure: to pursue an interlocutory appeal of an adverse ruling on bail (Br. 21); to object to the Government's offers of evidence and improper arguments (Br. 10, 14-16, 23-24, 26-30a, 33, 42-43); to call witnesses and present evidence on his client's behalf (Br. 13-14, 22-23); to conduct artful cross-examination (Br. 31-33, 39); to compel the Government to prove beyond a reasonable doubt every element of the crimes charged (Br. 29); and to effectively argue his client's case to the jury. (Br. 31, 33-41). Allegations such as these of "tactical errors and strategic miscalcula-

tions" afford no constitutional grounds for relief, unless the conduct of counsel was of such a kind "as to shock the conscience of the Court and make the proceedings a farce and mockery of justice." *United States ex rel. Walker* v. *Henderson*, 492 F.2d 1311, 1312 (2d Cir.), *cert. denied*, 417 U.S. 972 (1974) citing *United States* v. *Wight*, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1950); see also *Rickenbacker* v. *Warden*, Dkt. No. 76-2036, slip op. 1063, 1069-70 (2d Cir., December 22, 1967); *United States* v. *Sanchez*, 483 F.2d 1052, 1057 (2d Cir. 1973), *cert. denied*, 415 U.S. 991 (1974). None of the objections raised on appeal to Mr. Hallinan's trial strategy —composed, as they have been, with the benefits of hindsight and ample time for reflection—even approaches a colorable claim under this very stringent standard.*

In addition to his challenges to his attorney's trial tactics, Rodriguez also charges (i) that Mr. Hallinan did not adequately consult with him prior to trial (Br. 12-

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* It is particularly significant, in light of this standard, that "the conscience of the Court" below was *not* shocked by Mr. Hallinan's performance in this case. In a memorandum opinion filed on March 11, 1977, denying Rodriguez bail pending appeal, at pages 2-3, Judge Duffy wrote:

> The final argument [of Rodriguez on appeal] apparently is a claim of incompetence by trial counsel for the defense. I have been around the federal courts for the past twenty years as prosecutor, defense attorney, Regional Administrator of the Securities and Exchange Commission, and as a judge, and I have never seen such a totally baseless and spurious claim. Trial counsel for Col. Rodriguez recognized that he was fighting an uphill battle, but conducted himself in a totally professional manner. His reputation for competence in this courthouse is of the highest order, and it is well merited. The attack on that reputation by appellate counsel can only be based upon a lack of understanding of the tactics and strategy of an able trial attorney.

13); (ii) that Mr. Hallinan did not conduct a sufficient pre-trial investigation into State Department procedures (Br. 16-19); (iii) that Mr. Hallinan did not interview potential witnesses or follow up other investigative leads (Br. 11-14, 16, 19); and (iv) that Mr. Hallinan did not adequately research the rules of evidence and other law applicable to this case. (Br. 19, 23). Being based on unsubstantiated assertions of facts outside the record, these accusations are insufficient to raise even a colorable claim of ineffective assistance of counsel, in the absence of "an affidavit of [appellant's] attorney in support of his claim or his own affidavit giving a satisfactory explanation of why he cannot submit an affidavit from his attorney." *United States* v. *Welton*, 439 F.2d 824, 826 (2d Cir.), *cert. denied*, 404 U.S. 859 (1971); *United States* v. *Wisniewski*, 478 F.2d 274, 284 (2d Cir. 1973).

POINT V

The District Court's Instructions to the Jury Were Entirely Proper.

Finally, Rodriguez and Geraldo assign as error (1) the District Court's failure to give an instruction *sua sponte* to the jury that each defendant must be linked to the conspiracy by independent, non-hearsay evidence (Br. 57); (2) Judge Duffy's charge that the jury need not find that guilt had been proven "beyond all possible doubt" (Br. 65); and (3) the refusal of the court to direct the jury that it must infer from the Government's failure to call one of its informants, Anthony Stagg, that Stagg's testimony would have been unfavorable to the Government. (Br. 70).

The first contention—that Judge Duffy should have preliminarily charged the jury concerning the admissi-

bility of co-conspirators' statements—was never brought to the District Court's attention at any time during the trial. Consequently, it may not be raised for the first time on this appeal. See Fed. R. Crim. Proc., Rule 30; *United States* v. *Moore*, 505 F.2d 620, 624 (5th Cir. 1974), *cert. denied*, 421 U.S. 918 (1975). Moreover, contrary to appellants' assertion, no cautionary instruction concerning the requirement of independent evidence in conspiracy cases was required, because in this circuit the "determination of the adequacy of that proof is for the judge", not the jury. *United States* v. *Nuccio*, 373 F.2d 168, 173 (2d Cir.), *cert. denied*, 392 U.S. 930 (1967); See *United States* v. *Cirillo*, 468 F.2d 1233, 1240-41 (2d Cir. 1972), *cert. denied*, 410 U.S. 989 (1973); *United States* v. *Dennis*, 183 F.2d 201, 230-31 (2d Cir. 1950), *aff'd.*, 341 U.S. 494 (1951). See generally Fed. R. Evid., Rule 104(a); *United States* v. *Jacobs*, 475 F.2d 270, 285 n.31 (2d Cir.), *cert. denied sub nom. Thaler* v. *United States*, 414 U.S. 821 (1973).

Finally, this claim overlooks the plain fact that Judge Duffy *did* give a preliminary warning to the jury that he was accepting hearsay testimony "subject to connection" and that at the end of the trial "[i]f there is no connection whatsoever, I want you to take out your mental erasers and forget it." (Tr. 65).* Thereafter, at the conclusion of the trial, in its charge to the jury, the

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* The defendants cannot seriously contend that the non-hearsay evidence was in fact insufficient to demonstrate by a preponderance of the evidence their participation in the conspiracy. Both of them attended and paricipated in meetings during the course of this conspiracy. Audiotapes and a videotape of these meetings were played for the jury. The admissions of each defendant contained on these tapes provided more than ample independent evidence of their participation in the conspiracy. See *United States* v. *Barrera*, *supra*, 486 F.2d at 338; *United States* v. *Calabro*, *supra*, 449 F.2d at 889.

District Court gave a full explanation of the requirement of independent evidence:

> "I mentioned to you that certain evidence was taken subject to connection. I told you at the time I would explain it in detail to you. If you are satisfied beyond a reasonable doubt that a conspiracy existed and that a particular defendant was a member, then the acts and declarations of any other person whom you also find was a member of the conspiracy made during the existence of the conspiracy and in furtherance of its objects are the acts and declarations of all the members of the conspiracy, even though they were not present."
>
> * * * * *
>
> "As I explained, statements and acts of a conspirator, of the alleged conspirator, each alleged conspirator, must be considered by you to determine whether he knowingly, wilfully and intentionally joined in the conspiracy, if you find one to exist. If you find that he did, then statements or acts of other proven co-conspirators can be considered only if in furtherance of and during the existence of the conspiracy. Proof of a subsequent statement is not and cannot be the substitute for proof of the crime charged in this indictment." (App. 40A; 44A).

Thus, the defendants received far more than their due under the law, and their claim is frivolous.

The challenge to the District Court's reasonable doubt charge (App. 27A-29A)—also raised for the first time on this appeal, see *United States* v. *Acarino*, 408 F.2d 512, 517 (2d Cir.), *cert. denied*, 395 U.S. 961 (1969)*—

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* Neither of the defense attorney's raised any objection to the District Court's charge on reasonable doubt, or, indeed, to any other part of its charge. (App. 63A).

is similarly unsupported in law and fact. The precise language in Judge Duffy's charge to which the defendants object (see Br. 65) has received the express approval of this and other Courts. For example, in *United States* v. *Barrera, supra*, 486 F.2d at 339-40, this Court upheld a charge including the following instruction:

> "A reasonable doubt does not mean positive certainty beyond all positive doubt. The law in a criminal case is that it is sufficient if the guilt of a defendant is established beyond a reasonable doubt, not all possible doubt."

See also *United States* v. *Kirk*, 534 F.2d 1262, 1279 (8th Cir. 1976); *Friedman* v. *United States*, 381 F.2d 155, 160-61 (8th Cir. 1967). See generally, *United States* v. *Magnano*, 543 F.2d 431, 436-37 (2d Cir. 1976), *cert. denied*, 45 U.S.L.W. — (1977).

Furthermore, appellants' allegation that the District Court's charge "created a heavy weight in favor of conviction" (Br. 65) is fabricated by unfairly isolating portions of the charge. When read in its entirety (App. 27A-29A), as it must be, *United States* v. *Guillette*, 547 F.2d 743, 750 (2d Cir. 1976); *Cupp* v. *Naughton*, 414 U.S. 141, 146-47 (1973), the charge more than adequately conveys the concept of reasonable doubt, in language that has received repeated judicial approval. See, e.g., *United States* v. *Barrera, supra; United States* v. *Acarino, supra*, 408 F.2d at 517; *United States* v. *Nuccio, supra*, 373 F.2d at 174-75; *United States* v. *Accardi, supra*, 342 F.2d at 699; *United States* v. *Kirk, supra*, 534 F.2d at 1279; *United States* v. *Crouch*, 528 F.2d 625, 630-31 (7th Cir. 1976); *Cupo* v. *United States*, 359 F.2d 990, 994 (D.C. Cir. 1966).

The final contention—that Judge Duffy erred when he declined to give Geraldo's requested "available witness" charge (Br. 70)—is contrary to the settled law in this circuit that the failure of any party to call an equally available witness permits, but does not require, the jury to draw unfavorable inferences therefrom.

The particular instruction which the District Court declined to give was Geraldo's Request to Charge No. 3, which read as follows:

> "The failure to call a witness that is in the control of the government and whose testimony would not be cumulative, creates the presumption that that witness' testimony would be unfavorable to the government's case. The entire allegations of criminal conduct in this indictment centers around Michael Stagg, who engineered and directed the actions of the parties. The government's failure to call him as a witness creates the presumption that his testimony would be unfavorable."

Although Mr. Stagg was "in the control of the government" (i.e., in federal protective custody), he was equally available to the defense as a witness had either defendant chosen to subpoena him. Cf. *United States* v. *Armone*, 363 F.2d 385, 404-05 (2d Cir. 1966); *United States* v. *D'Angiolillo*, 340 F.2d 453, 455-56, (2d Cir.), *cert. denied*, 320 U.S. 955 (1965); *United States* v. *LaRocca*, 224 F.2d 859, 861 (2d Cir. 1955). Under these circumstances, the proper instruction on the failure to call Stagg as a witness was either that no inference at all may be drawn against any party, *United States* v. *Cheung*, Dkt. No. 76-1362, slip op. 2063, 2069 (2d Cir., Feb. 28, 1977); *United States* v. *Erb*, 543 F.2d 438, 444-45 (2d Cir.), *cert. denied*, 45 U.S.L.W. 3400 (U.S., Nov. 29, 1976); *United States* v. *Miranda*, 526 F.2d 1319, 1331

(2d Cir. 1975), *cert. denied*, 45 U.S.L.W. 3249 (U.S., Oct. 4, 1976); or, as Judge Duffy actually charged,* that the failure to call Stagg permits, but does not require, an inference to be drawn against any or all parties. *United States* v. *Dixon*, 536 F.2d 1388, 1394 (2d Cir. 1976); *United States* v. *Crisona*, 416 F.2d 107, 118 (2d Cir. 1969), *cert. denied*, 397 U.S. 961 (1970); *United States* v. *Llamas*, 280 F.2d 392 (2d Cir. 1960).

Thus, the particular instruction that Geraldo had requested need not—and, indeed, should not—have been given by the trial court.

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* The District Court gave the following charge to the jury concerning the availability of witnesses:

> "Generally, if it is particularly within the power of a party to produce a witness who could give material information, material testimony, on an issue in the case, failure to call a witness may give rise to an inference that the witness' testimony might be unfavorable to that party. But whether that inference will be made is up to you to decide. You are free not to do so.
>
> If the witness is equally available to both sides, then you may, but again need not, draw an inference against either or both of the parties.
>
> If you find that it would be merely cumulative or repetitive, you can consider that also. A word of caution: You must always bear in mind that the law does not impose on a defendant in a criminal case the burden of calling any witness or produce any evidence. It is important that you remember that." (App. 22A).

CONCLUSION

The judgments of convictions should be affirmed.

Respectfully submitted,

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Assistant United States Attorneys, Of Counsel.

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Form 280 A - Affidavit of Service by mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

JAMES A. MOSS being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 31ST day of MARCH, 1977, he served ~~a copy~~ two copies each of the within BRIEF by placing the same in a properly postpaid franked envelope addressed:

CHARLES SCOTTON, ESQ.
299 Broadway
N.Y., N.Y.

and

GORDON LANG, ESQ.
299 Broadway
N.Y., N.Y.

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

James A. Moss
A.U.S.A.

Sworn to before me this

31ST day of MARCH, 1977.

Maria A. Israelian

MARIA A. ISRAELIAN
Notary Public, State of New York
No. 31-4521851
Qualified in New York County
Term Expires March 30, 1978